SUPREME COURT OF APPEALS OF VIRGINIA.

NORFOLK & W. RY. CO. *v.* STONE.

Jan. 12, 1911.

[69 S. E. 927.]

1. Trial (§ 252*)—Instructions—Evidence to Sustain.—In an action against a carrier for requiring a white passenger to ride in a coach provided for negroes, it was reversible error to instruct that punitive damages could be allowed if the conductor's act was wanton or oppressive, in the absence of evidence tending to show such facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 601-603; Dec. Dig. § 252.*]

2. Carriers (§ 278*)—Passengers—Mistreatment—Instructions.—Where a white passenger sued a carrier for compensatory damages, an instruction that, if the conductor forced her to ride in the car set apart for negroes, she was not limited to actual damages, but that her discomfort and humiliation could be considered, was improper as being misleading.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1081; Dec. Dig. § 278.*]

3. Carriers (§ 277*)—Passengers—Mistreatment—Damages.—Compensatory damages to a white passenger for being compelled to ride in a coach set apart for negroes include compensation for discomfort and humiliation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1082-1084; Dec. Dig. § 277.*]

4. Carriers (§ 278*)—Passengers—Mistreatment—Instructions.—In an action against a carrier for requiring a white passenger to ride in a coach set apart for negroes, it was improper to modify instructions which precluded recovery if the conductor honestly believed that the passenger was a negro, by the clause "unless plaintiff made known to the conductor that she was a white woman."

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1081; Dec. Dig. § 278.*]

Error to Circuit Court, Nansemond County.

Action by Rosa Stone against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Bernard & Townsend, E. E. Holland, and *Theo. W. Reath,* for plaintiff in error.

S. E. Everett and *R. W. Withers,* for defendant in error.

---

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

WHITTLE, J. The defendant in error (the plaintiff below), a white woman, took passage on an east-bound morning train of the plaintiff in error (the defendant below) at Myrtle for Suffolk, and by the direction of the conductor entered the coach set apart for colored passengers. The sole occupants of that coach were the plaintiff, a negro man (who occupied a seat at the opposite end of the car from the plaintiff), and a negro woman, Georgia Baker. The plaintiff and Georgia Baker had been acquainted for 15 or 20 years, and the latter remarked to her, in the presence and hearing of the conductor, who had entered the car to take up tickets: "Law, Miss Rosa, you are wrong." To which the plaintiff replied: "I know I'm wrong. I'm not in my right place. I was raised with white people, and am white, and I'm going out of here." Whereupon the conductor observed: "Keep your seat. You've got to stay somewhere, and there's plenty of room." Suffolk is eight miles from Myrtle, and the first stop after leaving that station; the time between the two stations from 10 to 15 minutes. The conductor had no recollection whatever of the incident, but frankly admitted that if he had known the facts he would not have subjected the plaintiff to the hazard of going from one car to another on a rapidly moving train, unless she had specially requested it; that if he had done so, and injury had ensued, the company would have had to respond in damages.

It is not pretended that such request was expressly made by the plaintiff in the presence instance. Independently, therefore, of any blame that may have attached to the defendant by reason of the original mistake in directing a white woman to go into the colored car, it can hardly be doubted, in the circumstances indicated, that the course outlined by the conductor would have been the most prudent one.

There were two trials of the case, practically upon the same evidence. At the first trial, the jury returned a verdict for the plaintiff for $500. This verdict, on motion of the defendant, was set aside. Several grounds were assigned for this motion, but the reasons which actuated the court in granting it do not appear. Without considering other assignments, the fact that the jury were instructed that, if they believed from the evidence the act of the conductor was "wanton or oppressive and in utter disregard of the plaintiff's rights," they could award punitive damages, afforded a quite sufficient reason in itself for setting aside the verdict.

Without considering the question of liability of the defendant to answer in punitive damages for such alleged misconduct of the conductor as is contemplated in the instruction, in the absence of previous authority or subsequent ratification by the defendant, the instruction ought not to have been given because there was no evidence whatever to support it.

At the second trial there was a verdict for the plaintiff for $400, which the court refused to disturb.

The grounds of the motion to set aside the last verdict were the giving of a certain instruction on behalf of the plaintiff, and amending two instructions asked by the defendant, and because the verdict was contrary to the law and the evidence and the damages so excessive as to manifest passion and prejudice on the part of the jury.

The instruction for the plaintiff told the jury that if they believed from the evidence that she was directed by the conductor to the colored car, and when he came in to take up her ticket it was made known to him that she was a white person, and she insisted on going into the white car, and the conductor forced her to ride in the colored car, they must find for the plaintiff. And in assessing her damages they were not limited to compensation for the actual damages sustained by her, but might in addition take into consideration the discomforts, mortification, and humiliation suffered by her, if they believed from the evidence that such had been proved with reasonable certainty.

Upon the plaintiff's theory of the case, on the second trial, the damages to which she was entitled were compensatory damages merely, which, if the jury believed the evidence justified it, would include the constituents of discomfort, mortification, and humiliation. If that is the correct interpretation of the instruction, it correctly states the law. It seems to us, however, that the phraseology employed renders the meaning of the instruction obscure, and was calculated to confuse and mislead the jury. They should have been plainly told that, if they believed from the evidence that the facts recited in the instruction were proved, the plaintiff was entitled to recover compensatory damages, and that discomfort, mortification, and humiliation, if proved with reasonable certainty to have been suffered by the plaintiff, constituted elements of such damages.

The court's amendment of the following instructions offered by the defendant is also assigned as error:

"(2) If the jury believe from the evidence that the plaintiff voluntarily entered the car set apart for colored passengers, that the conductor found her in this car and believed that she was a colored person, and, acting in good faith under such belief, when he saw her rise from her seat as if to leave it or the car, told her to take her seat, they must find for the defendant, although they may further believe from the evidence that the plaintiff was and is in fact a white person."

"(3) What race a person belongs to cannot always be determined infallibly from appearances. When a mistake is innocently made, the railroad company is not liable in damages simply because a white person was taken for a negro or a negro for a

white person, where the aggrieved party does not disclose her race. It is not a legal injury for a white person to be taken for a negro under such circumstances. It is not contemplated by the statute of Virginia applicable to such cases that the carrier should be an insurer as to the race of its passengers. The court accordingly instructs the jury that, if they believe from the evidence that the conductor made in this case an honest mistake as to the race of the plaintiff, they must find for the defendant."

The amendment to each of these instructions reads: "Unless they further believe from the evidence the plaintiff then and there made known to the said conductor that she was a white woman."

Two theories of the case are submitted for consideration by the evidence, namely: On behalf of the plaintiff, that the conductor, although it was made known to him that the plaintiff was a white woman, required her to ride in the car set apart for colored persons; and, on behalf of the defendant, that the conductor acted in good faith under the honest belief that the plaintiff was a negro. The purpose of the defendant's instructions (which were practically rendered meaningless by the amendment) was to submit its theory of the case to the jury. In this, it was plainly within its rights, and the court should have given the instructions as prayed for without amendment. Jackson's Case, 96 Va. 107, 30 S. E. 452; Richmond Traction Co. *v.* Martin's Adm'r, 102 Va. 209, 45 S. E. 886.

As the judgment must be reversed for the foregoing errors, and the case remanded for a new trial, the remaining assignment of error need not be noticed.

Reversed.

CARDWELL, J., absent.

CITY OF RICHMOND *v.* MODEL STEAM LAUNDRY.

Jan. 12, 1911.

[69 S. E. 932.]

1. Constitutional Law (§ 213*)—Equal Protection—Police Regulations—Validity.—An ordinance prescribing a penalty for using a furnace for melting metals or glass, or for using a stationary steam engine, in which fuel other than anthracite coal is used, without a permit from the city council, fixing the location, height of stacks, etc., is invalid, as violating Const. U. S. Amend. 14, in that it vests

*For other cases, see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.